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No. 88-153

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY AND GULF OIL CORPORATION (NOW, BY CHANGE OF NAME, CHEVRON U.S.A. INC.),
Petitioners,

v.

PHOENIX CANADA OIL COMPANY, LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF THE RULE OF LAW COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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The Rule of Law Committee respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of the attorney for petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

The Rule of Law Committee is an informal voluntary association of legal representatives from major American

multinational corporations engaged in banking, petroleum, manufacturing, export and construction activities.[1] Members of the Committee and the organizations they represent have a strong interest in promoting the consistent and accurate resolution of international and transnational legal issues. The Committee from time to time files briefs as *amicus curiae* in this and other courts.[2]

This case presents the question of whether federal courts applying the law of a civil jurisdiction should disregard the decisions of the courts of the country whose law is being applied. In determining the amount of prejudgment interest to award under Ecuadorian law, the Third Circuit in this case expressly declined to follow a decision of the Supreme Court of Ecuador that was acknowledged to be on point.

We submit that the Third Circuit erred in holding that questions of foreign civil law are to be determined without regard to the judicial decisions of the country in question. The holding of the Third Circuit on this issue is in conflict with a long-standing decision of the Second Circuit.

This issue is important to members of the Committee because they represent organizations that have business operations throughout the world and engage in numerous international legal transactions. Much of the world's population resides in countries with civil law systems. American courts are often called upon to resolve

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[1] Members of the Committee are employed by Bank of America, Bechtel Group, Inc., Chase Manhattan Bank, Chevron Corporation, E.I. du Pont de Nemours & Co., Exxon Corporation, Texaco Inc., and Mobil Oil Corporation.

[2] *See, e.g., Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983); *Boureslan v. Aramco,* No. 87-2206 (5th Cir. argued Nov. 4, 1987); *Allied Bank International v. Banco Credito Agricola de Cartago,* 757 F.2d 516 (2nd Cir. 1985), *cert. dismissed,* 473 U.S. 934 (1985).

disputes that require the application of foreign civil law.[3]

The approach taken by the Third Circuit in this case will increase the uncertainty surrounding international transactions and business activities in civil law jurisdictions because it disregards the judicial decisions of those countries where their law is applicable. The outcome of a dispute may thus vary depending upon the country in which a lawsuit is filed, and forum shopping by plaintiffs will be encouraged.

Amicus curiae therefore submits that the Court should grant the petition and resolve the intercircuit conflict by adopting the approach of the Second Circuit.

Respectfully submitted,

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September 26, 1988

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[3] *See, e.g., Cunard Steamship Co., Ltd. v. Salen Reefer Services AB*, 773 F.2d 452 (2nd Cir. 1985); *Basch v. Westinghouse Electric Corp.*, 777 F.2d 165 (4th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986); *Twohy v. First National Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985).

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INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

This case arises out of the payment arrangement for an oil concession in Ecuador. Phoenix Canada Oil Company brought a diversity action in federal district court in

Delaware, claiming breach of contract, unjust enrichment and breach of fiduciary duty. The court, applying Ecuadorian law, held that the defendants had underpaid amounts due on production of Ecuadorian oil in 1973-74, and awarded damages of about $365,000 plus about $532,000 in prejudgment interest. The Court of Appeals for the Third Circuit affirmed this award.[1]

The sole issue presented by this petition for certiorari involves the method of calculating prejudgment interest on the damages award. The Third Circuit affirmed the district court's decision interpreting the Ecuadorian code to mean that the rate of prejudgment interest should vary with the applicable statutory rate over time. The courts below rejected petitioners' argument that the interest rate should be fixed at the rate applicable when the complaint was served.

In resolving this issue, the courts below recognized that a decision by the Supreme Court of Ecuador, on similar facts, adopted the procedure argued for by petitioners. However, they held that courts in this country should apply the law of a civil jurisdiction without regard to case law from that country on the ground that such decisions have no precedential effect.

The holding of the courts below on this issue conflicts with a long-standing decision of the Court of Appeals for the Second Circuit, *Usatorre v. The Victoria*, 172 F.2d 434 (2d Cir. 1949), which *amicus curiae* believes to be correctly decided. The approach taken by the Third Circuit will encourage plaintiffs to burden courts in this country with suits involving questions of foreign law and generally impair the predictability of international transactions. We submit that the Court should grant certiorari

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[1] An issue regarding the enforceability of the award against the parent corporations was remanded. Pet. App. A17-21. We understand that the judgment on the underpayments claim has been satisfied and the remand thereby mooted.

and resolve this conflict by adopting the approach of the Second Circuit.[2]

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION IN THIS CASE CREATES A CONFLICT WITH THE SECOND CIRCUIT.

The key paragraph of the Third Circuit's decision in this case sets forth and disposes of the issue with beguiling simplicity:

> In so ruling, the [district] court accepted the views of Phoenix's expert and rejected those of the defendants' experts. The court also declined to follow a decision of the Supreme Court of Ecuador, *Segovia v. Acosta*, Judgment No. 341, Third Chamber, November 11, 1977, which presented a similar factual situation. The district court observed correctly the lack of precedential effect of judicial decisions in civil law jurisdictions.

Pet. App. A24-A25.

But legal questions are not always as simple as they first appear. A contrary approach to the precedential effect of judicial decisions in civil law jurisdictions was taken by Judge Frank of the Second Circuit, in an opinion for a unanimous panel that included Learned Hand. *Usatorre v. The Victoria*, 172 F.2d 434 (2d Cir. 1949).

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[2] The court of appeals also affirmed the district court's judgment against Phoenix on the unjust enrichment claim. Pet. App. A9-A12. Phoenix has filed its own petition for certiorari on this aspect of the court of appeals' decision (No. 88-158). *Amicus curiae* takes no position on the merits of that petition, except to note that the issues it presents are quite different from those raised in the instant petition. In essence, Phoenix claims that the lower courts mistakenly interpreted the purpose of certain payments made by the government of Ecuador to Gulf and Texaco in the 1970's. This appears to be a mixed question of fact and law, and in resolving it the lower courts did not announce any broad legal principle that would affect the determination of foreign law issues in other cases.

In *Usatorre*, the only evidence on a point of Argentine law was provided by an expert witness who gave little or no attention to the country's case law. After deciding that Argentine law must be applied, the court of appeals held that the expert's testimony was insufficient and remanded the case to the district court. Judge Frank explained the court's reasoning as follows:

> We have no knowledge of Argentine 'law,' nor more than a vague acquaintance with the judicial methods there prevailing. But casual readings of readily available material clearly indicate that, in all civil-law countries, despite conventional protestations to the contrary, much law is judge-made, and the courts are by no means unaffected by judicial precedents or 'case law' (which the civilians call 'judisprudence,' as distinguished from the interpretation of text-writers or commentators, called 'doctrine').

Id. at 439 (footnote omitted).

Then, in spite of the modest disclaimer quoted above, Judge Frank's opinion goes on to canvass the views of Aristotle, the Romans, Acquinas, Plowden, Dicey, and many others, on the role of judicial decision making in civil law jurisdictions. Space precludes reproducing his discussion in this brief, but we respectfully refer the Court to the opinion's scholarly and exhaustive analysis of this issue. *Id.* at 438-43.[3]

The holding of the Third Circuit in the instant case thus conflicts squarely with the holding of the Second Circuit in *Usatorre*, on the question of whether any weight should be given to the judicial decisions of a civil

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[3] Interestingly, a well-known work on the general principles of Argentine civil law refers to Judge Frank's opinion in *Usatorre* as an "eminent opinion of a great jurist," which constitutes "a valuable example of legal reasoning" and "an accurate vision of the romanist law from [a common law] perspective." E. Aftalion, F. Garcia Olano & J. Vilanova, *Introduccion al Derecho* 356 (Buenos Aires, 1965).

law jurisdiction in determining an issue of foreign law.[4] This Court should grant certiorari to resolve the conflict.

II. THE DECISION BELOW WILL INVITE FOREIGN PLAINTIFFS TO BURDEN COURTS IN THE UNITED STATES WITH SUITS INVOLVING QUESTIONS OF FOREIGN LAW.

This Court has recognized that American courts "are already extremely attractive to foreign plaintiffs" for a variety of reasons, and that, if forum shopping were encouraged, "[t]he flow of litigation into the United States would increase and further congest already crowded courts." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981) (footnotes omitted). Such forum shopping will be encouraged by the Third Circuit's holding that case law from civilian jurisdictions should be disregarded.

When a federal court applies foreign law, it should attempt to decide the issue as would a court in the country whose law is being applied.[5] Rule 44.1 of the Federal Rules of Civil Procedure was adopted to free judges from the evidentiary restrictions thought necessary when foreign law was treated as a question of fact.

> [T]he new rule provides that in determining [foreign] law the court is not limited by material presented by the parties; it may engage in its own

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[4] The fact that *Usatorre* antedates the adoption of Rule 44.1 of the Federal Rules of Civil Procedure does not deprive it of its vitality. Judge Frank's opinion anticipates the principle later made explicit in the federal rules that a court's determination on an issue of foreign law can be based upon "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence" and that such determination "shall be treated as of ruling on a question of law." What is more, courts within the Second Circuit continue to give weight to precedent from civil law countries. *See, e.g., Boxer v. Gottlieb*, 652 F. Supp. 1056, 1061-62 (S.D.N.Y. 1987).

[5] *See* 3 I. Zajtay, *International Encyclopedia of Comparative Law*, ch. 14, at 27 (1972).

> research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.

Notes to Fed. R. Civ. P. 44.1 (West 1988).

In the present case, the courts below and the parties all agreed that Ecuadorian law should determine the calculation of prejudgment interest. The court of appeals apparently recognized that Ecuador's regulations on interest rates were facially ambiguous, since it observed that they "applied to many different types of transactions and not merely to causes of action in court," and "must be read against their background of broad application." Pet. App. A24. In resolving this ambiguity, however, the court explicitly declined to follow a decision of the Supreme Court of Ecuador involving a similar factual situation. Instead, it considered the public policy of "full compensation" enunciated by this Court with regard to prejudgment interest in *West Virginia v. United States*, 107 S.Ct. 702, 706 n.2 (1987). Pet. App. A25.

The Third Circuit's determination of Ecuadorian law on this point deliberately differs from the result reached by the highest court of that country and substitutes for it an approach based upon public policy considerations derived from American law. As discussed more fully in point III below, we believe this approach is incorrect.

The importance of this issue is the powerful incentive it creates for forum-shopping plaintiffs from civil law jurisdictions to file suit in the United States. Such plaintiffs may, of course, be attracted by the possibility that a court's choice-of-law analysis would lead it to apply substantive American law.[6] The Third Circuit's approach creates an additional attractive possibility, that the

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[6] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18.

American court will apply foreign law but interpret it without regard to judicial decisions in the plaintiff's country, based upon American public policy considerations. The net result may be at least as advantageous to the plaintiff as having the court apply American law.[7]

In *Piper Aircraft v. Reyno*, *supra*, this court upheld the authority of district courts to dismiss cases brought by foreign plaintiffs on *forum non conveniens* grounds, particularly where the court otherwise would be required to apply foreign law. However, not all such cases can be dismissed in this manner. This Court in *Piper* recognized that the difficulty of determining issues of foreign law is but one of many factors to be considered by a court in applying the *forum non conveniens* doctrine. *Id.* at 260 n.29.

Moreover, the Court in *Piper* left open the question of whether federal courts in diversity cases should apply federal law or the law of the forum state in deciding *forum non conveniens* issues. 454 U.S. at 248 n. 13. Some states are quite hostile to the dismissal of foreign plaintiffs' cases on such grounds.[8] Federal courts sitting in such states thus may not be able to avoid resolving issues of foreign law in cases brought by forum-shopping plaintiffs.

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[7] Actually, in this case, the plaintiff got the best of both worlds. An outright application of Delaware law would have produced a prejudgment interest award calculated at a flat 6 percent, or about $234,000. Pet. at 4 n.5. An application of Ecuadorian law as interpreted by its Supreme Court would have produced an award calculated at a flat 8 percent. The hybrid approach taken by the courts below produced an award calculated at a segmented rate ranging from 8 to 23 percent, or about $532,000. Pet. App. A24-25.

[8] In *Alfaro v. Dow Chemical Co.*, 751 S.W.2d 208 (Tex. Ct. App. 1988), the court held that Texas law "provides a foreign plaintiff with an absolute right to maintain a death or personal injury cause of action in Texas without being subjected to forum non conveniens dismissal."

Cases brought in the United States by foreign plaintiffs are increasingly common, particularly in the area of tort law. The litigation arising out of the Bhopal disaster is perhaps the best-known example.[9] Some commentators believe that the trend is likely to continue, as the propensity for large awards by American courts in tort cases receives publicity abroad.[10]

The question of law as to which the Second and Third Circuits are in conflict is thus one of importance to the functioning of the courts in this country. The approach taken by the Third Circuit will encourage foreign plaintiffs to bring suits in the United States in the hope of achieving a more favorable interpretation of law than would be available from the courts of their own country.

This kind of forum shopping will also disrupt international transactions. This Court has long emphasized the importance of certainty in multi-country transactions. Upholding the validity of choice of forum clauses in international trade contracts, the Court stated that: "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade." *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, at 13-14 (1972). Similarly, in upholding the validity of arbitration clauses in these contracts, the Court commented that:

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[9] *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part and modified in part*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 199 (1987).

[10] *See* Jennings, *Extraterritorial Toxic Torts: Foreign Plaintiffs Seek Access to U.S. Courts*, Trial, Oct. 1986 at 63; Boehringer, *Exporting or Importing Justice? Access to U.S. Courts for Victims of Extraterritorial Toxic Torts*, Trial, Mar. 1987, at 65; Taylor, *Eyes of Lawyers Upon Texas?*, National Law Journal, Sept. 12, 1988, at 3.

> [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries . . . A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk v. Alberto-Culver Co. 417 U.S. 506, at 516 (1974). When courts apply foreign civil law while disregarding the judicial decisions of the country in question, the kind of certainty encouraged by this Court becomes impossible. The approach taken by the Third Circuit in the instant case is inconsistent with this Court's admonition against the "parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen*, at 9.

III. THE DECISION BELOW INCORRECTLY HOLDS THAT COURT DECISIONS IN CIVIL LAW JURISDICTIONS HAVE NO PRECEDENTIAL WEIGHT.

We have already referred the Court to Judge Frank's scholarly analysis of this point in *Usatorre v. The Victoria*, 172 F.2d 434, 438-43 (2d Cir. 1949). More recent authorities fully support his conclusion that court decisions should be consulted in deciding questions of civil law, and refute the contrary view of the Third Circuit.

The myth that court decisions have no precedential value in civilian systems derives from superficial study. Many civil codes contain prohibitions on judge-made law and give court decisions binding effect only in the case at hand.[11] Legal theory in civilian systems also holds that

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[11] *E.g.*, ABGB art. 12 (Austria) (J.R. von Winiwarter trans. 1972): "The decisions issued in individual cases and the opinions handed down by the courts in particular litigations never have the

court decisions can have no binding effect.[12] These surface features have led to misconceptions and obscured the true state of affairs.

Closer inspection reveals that in nearly all civilian systems prior court decisions play an important role in determining the outcome of a specific case. Contrasting theory to practice, one commentator argues that:

> In many countries it is strongly denied that decided cases are a source of law. It is, however, certain that in those very countries the judges take great account of precedents, using them as an aid in recognizing the existence of a custom or deciding how a statute is to be interpreted. In the absence of convincing contrary arguments they consider it wisest to follow precedent, especially if the precedents cited emanate from a court whose authority is superior to their own. To aspire to improve upon its reasoning would be presumptuous; also, they know that the costs of such an initiative would fall on the litigants.[13]

A survey of the various civilian systems demonstrates that this thesis is nearly universally true. In Austria, for example, in spite of the Code's strong prohibition, "The factual impact of precedents, especially decisions of the Supreme Court, and eventually the Court of Appeals (Oberlandesgerichte), is very high. Since no judge will depart from precedents without sound reason, decisions are frequently cited, almost with the same confidence as statutes." [14] In France and Germany:

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force of a law; they cannot be extended to other cases or to other persons."

[12] 2 R. David, *International Encyclopedia of Comparative Law*, ch. 3, at 116 (1984): "Decided cases are not to be a source of law. Judicial decisions must be . . . justified by sources other than 'precedents' resulting from the practice of the courts."

[13] *Id.* at 112.

[14] H. Kantner, "The Legal System of the Republic of Austria," in 4 *Modern Legal Systems Cyclopedia* 17, at 55 (K.R. Redden ed. 1984).

> In order to judge the importance of judicial decisions in formulating the law, one must again be wary of those ready-made formulae which, with the aim of underscoring the exclusivity of enacted law, flatly exclude decided cases as a source of law. These statements are somewhat ridiculous when used in countries such as France or Germany, where cases have been of primary importance in the evolution of some branches of the law and where very often doctrinal works do no more than provide an exegis of judicial decisions.[15]

Italy has been described similarly: "Whatever the folklore may say about the value of precedent, the fact is that courts do not act very differently toward reported decisions . . . in Italy than they do in the United States." [16] Many more European examples could be given.[17]

Circumstances differ little in the Latin American countries. In Ecuador, as in the other civil law countries, court decisions have no binding effect:

> But no one can deprive decisional law of the moral authority it has. Above all, the decisions of the Supreme Court will serve as inspiration to the inferior judges when deciding similar cases. Also, citizens

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[15] R. David & J. Brierley, *Major Legal Systems in the World Today* at 121 (2nd ed. 1978) (footnote omitted).

[16] J. Merryman, "The Italian Legal Style III: Interpretation," in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 167, at 194 (J. Dainow ed. 1974).

[17] *See, e.g.*, France: J. Carbonnier, "Authorities in Civil Law: France," in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 91 (J. Dainow ed. 1974); H. de Vries, *Civil Law and the Anglo-American Lawyer* at 295 (1976): "[T]he basic arguments for adherence to *stare decisis* by the common law courts have produced a similar pattern of predictable judicial behavior in France"; Germany: 1 E. Cohn *Manual of German Law* at 4 (2nd ed. 1968); Netherlands: I. Kisch, "Sources of Netherlands Law," in *Introduction to Dutch Law for Foreign Lawyers* at 14 (1978).

> learning the Supreme Court's position, will know in fact how their controversies will be decided, and, thus, be able to direct their activities with greater reliance.[18]

Again, many other examples are available.[19]

Civil law jurisdictions often accord special respect to decisions rendered by the highest court of the country. In Argentina, for example, the Federal Supreme Court has reprimanded lower courts for "deliberate disregard of its authority" when they have failed to follow its prior decisions.[20] Similarly, in the Netherlands, "The Highest

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[18] 1 J. Larrea Holguin, *Derecho Civil del Ecuador* at 69 (Quito 1984) (translation by amicus).

[19] *See, e.g.*, Bolivia: Fernando Aguirre B. "The Legal System of Bolivia," in 10 *Modern Legal Systems Cyclopedia* 9, at 35 (K.R. Redden ed. 1986); Brazil: Ivon D'Almeida Pires Filho, "The Federative Republic of Brazil," in 10 *Modern Legal Systems Cyclopedia* 53, at 72 (K.R. Redden ed. 1986):

> "[T]he principle of uniformity attached to the process of judicial review by the higher courts, called Tribunals, is tantamount to stare decisis in common law, whereby similar cases should be decided similarly. Even though lower courts do not have to abide by the Tribunals' jurisprudence, lower court decisions that do not are generally overruled on appeal."

Mexico: W. Butte, "Stare Decisis, Doctrine, and Jurisprudence in Mexico and Elsewhere," in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 311, at 328 (J. Dainow ed. 1974); Uruguay: D. Ferrere, "The Legal System of Uruguay," in 10 *Modern Legal Systems Cyclopedia* 233, at 255 (K.R. Redden ed. 1986): "Though precedents are not binding under Uruguayan law, decisions by well-known and respected judges or by the Courts of Appeals or the Supreme Court are normally followed by other judges or courts."

[20] 1 G.A. Borda, *Tratado de Derecho Civil Argentino* at 82 (Buenos Aires, 5th ed. 1970) (translation by amicus). *See also*, H. de Vries & J. Rodriguez-Novas, *The Law of the Americas* at 212 (1965): "In practice, the Supreme Court has maintained with rare exceptions that its decisions carry special weight and that they must be taken into account by the lower courts in deciding similar cases."

Court, that never expressly relies on its prior decisions, has even adopted the practice of deciding appeals by examining whether the decision of a lower court conforms, not to the instructions of the Code, but to one of its own precedents." [21] Even in those countries where such explicit policies have not been adopted, decisions of the highest courts carry special weight and are almost universally followed.[22]

The foregoing authorities amply demonstrate that the Third Circuit was in error when it refused to follow a decision of the Supreme Court of Ecuador on the ground that such decisions "lack . . . precedential effect." Pet. App. A25. If any generalization about precedent can be made with respect to civil law systems, it would be quite the opposite.[23] Precedent has great value in these sys-

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[21] P. Verbeek, "Retrospective and Prospective Judicial Lawmaking in Civil Litigation: A Comparative American-Dutch Analysis," in 3 *Modern Legal Systems Cyclopedia* 649, at 665-66 (K.R. Redden ed. 1984).

[22] *See, e.g.*, Belgium: M. Taeymans, "The Legal System of Belgium," in 3 *Modern Legal Systems Cyclopedia* at 38-39 (K.R. Redden ed. 1986); Brazil: H. de Vries & J. Rodriguez-Novas, *The Law of the Americas* at 198 (1965): "[S]ince the possibility of appeal is frequently utilized, in practice the lower courts follow decisions of superior courts, and especially of the Supreme Court."; France: H. de Vries, *Civil Law and the Anglo-American Lawyer* at 298 (1976): "The attitude of the lower courts towards decisions of the *Cour de Cassation* is in substance quite similar to that of the lower courts in common law jurisdictions toward decisions of superior courts. Even a single precedent established by the *Cour de Cassation* will usually be followed, though it may not be cited as the basis for the decision." Norway: M. Aarbakke & J. Helgesen, "Sources of Law in Norway," in *The Sources of Law: a Comparative Empirical Study* 189, at 211 (1982): "For subordinate courts . . . decisions of the Supreme Court will in practice be decisive. But formally, no precedents have binding force as sources of law."

[23] As one commentator has concluded with respect to France: "The temptation is strong to conclude that there is no fundamental

tems, especially when the precedent in question comes from the country's highest court as it did here.

CONCLUSION

For the reasons presented in this brief, *amicus curiae* submits that the Court should grant the petition and resolve this intercircuit conflict by adopting the approach of the Second Circuit.

Respectfully submitted,

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difference with respect to the weight given in practice to prior decisions in France and in common law countries." H. de Vries, *Civil Law and the Anglo-American Lawyer* 299-300 (1976).